

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-2047

To Be Argued By: Ann Freda Thomas

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOHN H. MONE,

Petitioner-Appellee,

-vs-

CARL ROBINSON, Warden,
Connecticut Correctional Institution
at Somers,

Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PETITIONER-APPELLEE

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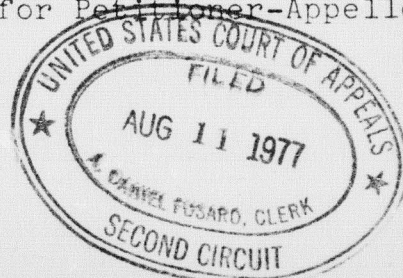


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John H. Mone,

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-VS-

Carl Robinson, Warden,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR PETITIONER-APPELLEE

STATEMENT OF THE CASE

In an order dated April 9, 1977, Judge M. Joseph Blumenfeld of the United States District Court for the District of Connecticut, granted appellee's petition for a writ of habeas corpus, pursuant to 28 U.S.C. §2254. Judge Blumenfeld's Memorandum of Decision, John H. Mone v. Carl Robinson, Warden, Connecticut Correctional Institution

at Somers (D. Conn. Civ. No. H-75-296, dated March 26, 1977), has been included in the Joint Appendix at page A74. Appellant appeals from Judge Blumenfeld's decision.

Petitioner, John H. Mone, evidently in the grip of an elaborate delusional system, believed that various cats were directing him to rout out corruption in Waterbury, Connecticut. (A10, A27-28, A58-A60). While he apparently was under the influence of these delusions and hallucinations, he and his codefendant wife, Nanette Mone, established contact with a motorcycle club in Waterbury. Eventually a kidnapping scheme emerged. The police were brought in almost at the inception of the plan by a member of the motorcycle club. Thus it was the state police who actually staged the kidnapping. (A8-A9).

On June 6, 1973, petitioner pled guilty to the crime of conspiracy to commit kidnapping in the second degree. At the same time his codefendant, Nanette, pled guilty to the lesser crime of accessory to attempted larceny by extortion. At the outset both had been accused by identical informations of the kidnapping scheme arising from

the extremely bizarre set of circumstances described above. They initially were each charged with conspiracy to commit kidnapping in the second degree, conspiracy to commit larceny by extortion, and accessory to attempted larceny by extortion.

Petitioner and his codefendant were sentenced on June 28, 1973, by Judge Dannehy of the Connecticut Superior Court, who also had presided over their guilty plea proceedings. At both proceedings and in negotiating their plea bargains with the State's Attorney, petitioner and his codefendant were represented by a single attorney, retained by their family, James N. Egan. There is nothing in the record to demonstrate that either Attorney Egan or Judge Dannehy ever questioned the petitioner about any possible conflict of interest arising out of the joint representation.

Egan arranged a package plea bargain for petitioner and his codefendant (A43 and A53-A54) that was to her advantage and entirely to his disadvantage. At sentencing Egan pursued the same prejudicial course, describing petitioner as the culpable party and his codefendant as an innocent dupe. (A26).

From the time that he assumed the representation of petitioner Egan must have been aware of the substantial probability that John Mone was not criminally responsible for his acts. Egan arranged for Mone's examination by a psychiatrist and a clinical psychologist. (A18-A19) The psychiatrist who examined petitioner, Dr. Donald R. Grayson, recommended that he undergo a battery of psychological tests since his explanation of the events leading up to his arrest was so bizarre.

These tests were performed by Wayne A. Owen, Ph.D. As a result of the tests Dr. Owen formed the opinion that petitioner was in a paranoid schizophrenic state and delusional at the time of the events in question. Dr. Owen also formed the opinion that petitioner's acts were "related to his delusional system of thinking and that said John H. Mone was unable to appreciate the wrongfulness of his conduct." (A58) Dr. Owen's views were set forth in his report. (A60) This report was transmitted to Dr. Grayson in late May of 1973, before petitioner and his codefendant pled guilty. At petitioner's sentencing Egan indicated that he was aware of the report and its contents.

Thus informed of the serious nature and extent of petitioner's mental illness, Egan proceeded to plea and sentence. The only reasonable explanation for Egan's

conduct is that he had also assumed the representation of Nanette, whose interests flatly conflicted with petitioner's interest in going to trial. In the face of this conflict Egan apparently chose to pursue Nanette's defense and abandon petitioner's.

Prior to his sentencing petitioner suffered from severe nervous attacks described as catatonic seizures. Egan indicated that he was aware of them at the time of sentencing. (A20) The symptoms did not abate after the sentencing. Petitioner was transferred from the psychiatric hospital unit at the Connecticut Correctional Institution at Somers to the Whiting Forensic Institute on September 19, 1973. There he was under the care of Dr. Ann Oberkirch, who formed an opinion as to his mental illness and criminal responsibility that was entirely consistent with that of Dr. Owen. (A63)

Petitioner received a sentence of not less than nine nor more than twenty years from Judge Dannehy. His codefendant received a suspended sentence.

ISSUE PRESENTED

Was the District Court correct in holding that petitioner was denied effective assistance of counsel within the meaning, of United States v. Lovano, as a result of the dual representation by a single attorney of petitioner and his codefendant?

ARGUMENT

THE DUAL REPRESENTATION OF PETITIONER AND HIS CODEFENDANT BY A SINGLE ATTORNEY RESULTED IN PREJUDICE TO THE PETITIONER.

It is clear that petitioner suffered actual prejudice, within the meaning of United States v. Lovano, 420 F.2d 769, 773(2d Cir.) cert. denied 397 U.S. 1071 (1970), as a result of the joint representation. His defense was entirely inconsistent with that of his codefendant. A single attorney could not have taken them both to trial, yet Egan pursued a joint defense, serving the interests of the codefendant at petitioner's expense. The existence of conflict and prejudice are apparent upon consideration of the circumstances under which Egan arranged the package plea bargain and Egan's conduct during the sentencing proceedings.

The bizarre factual circumstances of this case raise a serious question as to the petitioner's criminal responsibility for this crime. In fact, Judge Blumenfeld found in his Memorandum of Decision that "through documentary evidence [Exhibits A-E, App. A58-A70], petitioner has established that he had a viable insanity defense."

(A86). In light of this, one can only assume that the psychiatric evidence available to Egan put him on

notice that petitioner was mentally disturbed. (A58 and A60) Although Mr. Egan made reference to these reports at the sentencing hearing, he did not fully pursue this defense at trial or effectively argue it at the sentencing hearing. Instead, he arranged a package plea bargain for the two codefendants, foreclosing full exploration of petitioner's insanity defense. In so doing, Egan, in effect, chose to represent Nanette Mone's interest alone, leaving petitioner without an advocate.

The deal that Egan arranged was that the State's Attorney was to recommend a suspended sentence for the codefendant and a substantial term of years for the petitioner. The objective facts of this case as related by the prosecution (A7-A9, A16-A17) indicated that petitioner's codefendant had made many of the telephone calls upon which the prosecution based its case. Her only defense was to portray herself as the innocent dupe of a manipulating husband.

The plea bargain arrangement was very much in her interest. Had petitioner gone to trial on his insanity defense, which separate counsel probably would have advised him to do, or, if petitioner's counsel effectively argued the psychiatric evidence by way of mitigation, it would have

been next to impossible for Egan to continue to present Nanette as her husband's helpless pawn. Logically, it could not have been argued that she was misled by a person so insane as to lack criminal capacity. As a consequence, Egan's representation really amounted to a defense of lesser culpability for her and an abandonment of the petitioner.

Thus, petitioner with Egan's counsel, pled guilty in order to further Nanette's interests, when in the eyes of the law he may well have lacked criminal responsibility. Under these circumstances petitioner did not have the benefit of the untrammelled and unimpaired advocacy to which he was entitled in considering how to plead. See Von Moltke v. Gillies, 332 U.S. 708 (1948). Without question this was prejudicial to him. The harm was compounded when at sentencing Egan continued to carry out his strategy of shifting the onus of responsibility away from Nanette and onto the petitioner. In the course of the two sentencing proceedings petitioner was accused and convicted out of the mouth of his own attorney. At Nanette's sentencing, which immediately preceeded John's, Egan described her as a young woman, the "victim of circumstances to a degree", who had been "misled grievously by her husband." (A26-A27) Then, at his sentencing, the same attorney characterized

petitioner as someone who had "set in motion a chain of circumstances that could have culminated in total disaster for a number of people and actually did cause... a tremendous amount of mental anguish and concern for the family involved." (A19)

A defendant is denied the effective assistance of counsel when his own attorney emphasizes his culpability in an attempt to acquit or mitigate the sentence of a jointly represented codefendant. See United States v. DeBerry, 487 F.2d 448, 454 (2d Cir. 1973); Gravitt v. United States, 523 F.2d 1211, 1219 (5th Cir. 1975); United States ex rel. Taylor v. Rundle, 305 F. Supp. 1036, 1039 (E.D.Pa. 1969); United States ex rel Thompson v. Rundle, 284 F.Supp. 933, 934 (E.D.Pa. 1968). Such representation falls far short of the standard of loyal and independent advocacy to which every defendant is entitled. See Glasser v. United States, 315 U.S. 60, 70 (1942).

This is not simply an instance where joint representation resulted in undermining the appearance of justice, cf. United States v. Mari, 526 F.2d 117, 121 (2d Cir. 1975) (Oakes, J. concurring), but rather a case in which joint representation resulted in real prejudice to the defendant. The Court of Appeals for the

Fifth Circuit recently held that "active disservice" of that kind that petitioner received from Egan at sentencing "compels a finding of ineffectiveness." Gravitt v. United States, supra, at 1219. In that case one attorney represented two brothers who were codefendants on federal firearms charges. The attorney there first arranged a continuance that favored Ronnie, the brother who was out on bail, while the other brother, Jerry, was incarcerated. Then at sentencing the attorney successfully argued in mitigation that Ronnie "had just been at the wrong place at the wrong time with the wrong person." Id at 1217. (emphasis in original) The Court held that this disparagement of one codefendant demonstrated the impossibility of a joint defense.

While the attorney may have decided that nothing favorable could be said in Jerry Gravitt's behalf, we cannot presume that the actual remarks-unfavorably contrasting him with his brother Ronnie-did not influence the trial judge in his assessment of punishment. The attorney's active disservice to appellant's interests compels a finding of ineffectiveness.

523 F.2d at 1219

The court's language in Gravitt applies with equal force to the treatment that petitioner received at the hands of Egan..

The records of the sentencing proceedings demonstrate that Judge Dannehy was persuaded by Attorney Egan's arguments minimizing Nanette's culpability and emphasizing the offensiveness of petitioner's role. After hearing Egan describe her as a "young lady" who had been "mislead grievously by her husband" (A26), Judge Dannehy said:

I think that everybody has apparently come to agree that your husband deceived you and that you thought that he was engaged in writing a book, and that you were not aware of what he really planned and schemed to do. After considerable thought I believe that to be so. (A28)

He thereupon gave her the suspended sentence recommended by the State's Attorney. However, immediately following her sentencing, in petitioner's sentencing proceeding, Judge Dannehy rejected the recommendation of the State's Attorney with regard to petitioner and sentenced him to a term of nine to twenty years. This sentence was delivered after a presentation by Egan purportedly on petitioner's behalf, in which he emphasized the suffering that petitioner's conduct had caused.

The State has argued that petitioner was not prejudiced by the joint representation because he concurred in Egan's strategy. The State points to petitioner's statements to Judge Dannehy at the time of his guilty plea asking mercy for his wife, statements made after conferring

with Egan. (A13) But as Judge Blumenfeld said, "in this case where there was no waiver of petitioner's right to the unimpaired assistance of counsel, this strategy only heightens the prejudice that accrued because of the joint representation." (A88). In a similar factual situation this Court has stated

The government argues...that it was decided by the defendants that Edwards would serve as the "fall guy" and it was hoped that DeBerry would be acquitted. We do not know this, but even if we did, there would be all the more of a conflict of interest. No one should be represented by an attorney who is making him the "fall guy" by design.

United States v. DeBerry, supra, at 454; accord United States ex rel. Taylor v. Rundle, supra.

It is clear in this case, as Judge Blumenfeld found below and the state has not contested, that petitioner did not waive his right to effective assistance of counsel. To waive a constitutional right a defendant must make an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). While Judge Dannehy did ask petitioner at sentencing whether he was satisfied with Egan's representation, the court did not touch upon the question of any possible conflict of interest or prejudice arising

from the dual representation. Instead the court emphasized the fact that Egan had arranged to have the state drop two of the three counts with which petitioner had been charged.

The records of petitioner's guilty plea and sentencing proceedings do not even suggest that petitioner was aware of the potential conflict inherent in the dual representation of himself and his codefendant by a single attorney. On a silent record it cannot be said that there was a knowing and intelligent waiver of the right to effective assistance of counsel in this dual representation situation. United States v. Carrigan, 543 F.2d 1053 (2d Cir. 1976).

CONCLUSION

For the reasons set forth above, the petitioner-appellee respectfully submits that the judgment of the District Court should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing
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